No. 85-1052

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Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1985

BERNAT KUPFERSTEIN,

Petitioner,

-vs.-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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February 15, 1986

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether defendant's failure to alert the state court to his claim of ineffective assistance of counsel precludes certiorari review of that claim by this Court.

2. Whether the state trial court properly denied defendant's motion to withdraw his guilty plea where, based upon the record of a full evidentiary hearing, it found, that with advice of competent counsel, defendant had waived his constitutional rights, admitted his guilt, and pled guilty with full knowledge of the consequences.

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RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Respondent, the State of New York, asks this Court to deny the petition for a writ of certiorari, seeking review of the Second Circuit's judgment in this case.

The Second Circuit affirmed the judgment of the United States District Court for the Southern District of New York dismissing the petition of Bernat Kupferstein (hereinafter "defendant") for a writ of *habeas corpus.* Defendant is on probation pursuant to the judgment of the New York Supreme Court, Kings County, entered September 24, 1982, convicting him, after a plea of guilty, of Falsifying Business Records in the First Degree [N.Y. Penal Law §175.10 (McKinney's 1975 and Supp.

1984-85)], and sentencing him to five years' probation, $200,000 restitution, and $2,400 to be paid to the District Attorney's Office for trial expenses.

This Court has previously denied defendant's petition for a writ of certiorari to review the decision of the state appellate court affirming the judgment of conviction.

OPINIONS BELOW

The judgment of the Court of Appeals and the District Court are not officially reported; they are reproduced in defendant's appendix. The judgment of the New York Supreme Court, Appellate Division, Second Department, affirming defendant's conviction, is reported at 100 A.D.2d 983, 473 N.Y.S.2d 898 (2d Dep't 1984). The denial of leave to appeal the affirmance to the New York Court of Appeals is reported at 62 N.Y.2d 986, 479 N.Y.S.2d 1040 (1984). This Court's denial of certiorari to the New York State Supreme Court, Appellate Division, Second Department is reported at __ U.S. __, 105 S. Ct. 248 (1984).

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1985. The petition for certiorari was timely filed in this Court on December 17, 1985. This Court has jurisdiction of the petition pursuant to 28 U.S.C. § 1254(1).[1]

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[1]Defendant incorrectly invokes jurisdiction under 28 U.S.C. § 1257 which authorizes review of a decision of the highest state court.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be . . . compelled in any criminal case to be a witness against himself.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV §1

No state shall . . . deprive any person of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

Introduction

In 1977, defendant and Ferdinand Landau were indicted in Kings County, New York, for 124 counts of grand larceny, forgery, falsifying business records, and violations of the New York General Business Law. These charges arose out of numerous illegal real estate transactions occurring over a fifteen-year period and involving millions of dollars.

On April 28, 1981, defendant and Landau waived a jury and proceeded to trial. After two weeks of testimony, involving hundreds of exhibits, defendant and Landau pled guilty. Before sentence, defendant moved collaterally to withdraw his plea. After a full hearing, the court denied his motion and sentenced him according to the promise made at the time of the plea.

Defendant's conviction was affirmed without opinion by the Appellate Division, Second Department, 100 A.D.2d 983, 473 N.Y.S.2d 898 (2d Dep't 1984), and leave

to appeal to the Court of Appeals was denied, 62 N.Y.2d 986, 479 N.Y.S.2d 1040 (1984). Defendant's petition to this Court for a writ of certiorari to the New York State Supreme Court, Appellate Division, Second Department was also denied, __ U.S. __, 105 S.Ct. 248 (1984).

Defendant then brought the application for a federal writ of *habeas corpus* that is the basis for this petition. On May 30, 1985, the United States District Court for the Southern District of New York denied the application but granted petitioner a certificate of probable cause to appeal to the Court of Appeals for the Second Circuit (Knapp, J.). On November 1, 1985, the Court of Appeals affirmed the judgment of the District Court. This petition followed.

The Plea

On May 12, 1981, on the advice of counsel, defendant entered a plea of guilty to one count of Falsifying Business Records in the First Degree in full satisfaction of the indictment (A. 95-96).[2] Defendant stated that he had ample opportunity to discuss the case with his attorney, and that he was pleading guilty because he was in fact guilty (A.96).

The court explained that by pleading guilty defendant was confessing his guilt and waiving his right to continue the trial (A.97). The court advised defendant that he was not obligated to incriminate himself, and that he had the right to continue the trial, to cross-examine witnesses and to controvert the evidence against him (A.97-98). Defen-

[2]Landau was also convicted, on a plea of guilty, of Falsifying Business Records in the First Degree (New York Penal Law §175.10). He was sentenced to five years' probation, $300,000 restitution, and $2,600 to be paid to the District Attorney's Office. He never sought to withdraw his plea and never appealed his conviction.

Numbers in parentheses preceded by the letter "A" refer to page numbers of Defendant's Appendix used in the court below. Numbers in parentheses preceded by the letter "B" refer to page numbers of Respondent's Appendix used in the court below.

dant confirmed that he understood these rights and that his attorney had discussed them with him (A.98). Defendant acknowledged that he was entering the plea voluntarily, that he had not been promised anything in return for his plea, and that he was not currently under the care of a physician or taking any medication (A.96-98).

Defendant admitted that during the period of February 5, 1963 through April 1976 he had participated in a real estate arrangement whereby he agreed to be a contributing partner of Parkview of Hempstead Associates (A.99-100). Toward that end, he signed an instrument stating that he had contributed $10,000 to the enterprise when, in fact, he had not contributed any money (A.100-109). His intent in making the false entry was to make money for himself at the expense of the other partners (A.101). Over the years, the other partners relied on defendant's false contribution statement and defendant received profits from the real estate transactions (A.107-11).

The court indicated that it would probably impose a sentence of five years' probation (A.119-20), and as a condition of probation it would require restitution in the amount of $200,000 to the victims, plus $2,400 to be paid to the Office of the District Attorney (A.119, 139). The court would require the defendant to pay $80,000 on or before the sentence date (A.116), and the balance within four or five years, on a payment schedule to be determined at the time of sentence (A.119). If the court decided it could not keep its promise, then it would allow defendant to withdraw his plea (A.115).

Defendant acknowledged that he understood the conditions of the plea, and that he took the plea in order to dispose of the case once and for all (A.116-21).

Motion and Hearing to Withdraw the Plea

In an affidavit dated June 24, 1981, defendant moved in State Supreme Court, before the same judge who had taken his plea, for permission to withdraw the plea. He claimed that he was innocent of all crimes, but had pled guilty because his attorney had coerced him (A.89-91). The court ordered a hearing to determine defendant's claim.

The principal witnesses at the hearing were defendant BERNAT KUPFERSTEIN and MURRAY CUTLER, the attorney who had represented him at the plea. Defendant testified that he had retained Mr. Murray Cutler to represent him in this case in 1978 (Kupferstein: A.248). Prior to trial defendant wrote to Mr. Cutler about his case. He received no letters in response (Kupferstein: A.250-53), but he did speak with Mr. Cutler about the case before trial (Kupferstein: A.254). After the trial began, Mr. Cutler asked defenant if he wanted to plead guilty, but defendant said no (Kupferstein: A.256). When Landau decided to plead guilty, Mr. Cutler put pressure on defendant to do so also (Kupferstein: A.257). Defendant felt he had no choice but to plead guilty (Kupferstein: A.257).

At this point defendant consulted two other attorneys, ROBERT BARON and IRVING HEISLER, who advised him not to change attorneys in the middle of trial (Kupferstein: A.259; Baron: A.152; Heisler: A.201). Defendant felt that if he did not plead guilty, Mr. Cutler would not properly defend him (Kupferstein: A.259). Defendant testified that Mr. Cutler frightened him into thinking that he might go to jail if he did not take the plea (Kupferstein: A. 159-260). He decided to take the plea and to appeal later (Kupferstein: A. 259).

Defendant claimed that he was innocent because he only carried out the ministerial functions that Landau had

ordered him to perform (Kupferstein: A.245). Defendant admitted that the Parkview Associates partnership agreement accurately represented his false statement that he had contributed $10,000 of capital towards the purchase price of the property (Kupferstein: B. 29-30).[3]

Attorney Murray Cutler represented defendant during the three-year course of the case (Cutler: A.366). He made numerous court appearances, filed motions, and communicated with defendant on many occasions (Cutler: A.366-67).

At the beginning of the case, Mr. Cutler told defendant that the prosecutor had offered a plea. If defendant admitted his guilt, he would have to go to jail for ninety days and would have to pay $1,000,000 restitution (Cutler: A.368). Defendant did not want to plead guilty because he believed that he was not culpable (Cutler: A.368). Defendant claimed that Landau had masterminded the scheme and that he had just followed Landau's orders (Cutler: A.383). Mr. Cutler explained to defendant that he was culpable even though his role in the fraud had been less important than Landau's role (Cutler: A.383). Mr. Cutler also made defendant aware of the consequences of going to trial on a 124 count indictment (Cutler: A.369).

After two weeks of the trial, Landau decided to plead guilty (Cutler: A.370). Mr. Cutler and defendant discussed all of defendant's options and the consequences of entering a guilty plea. Mr. Cutler advised defendant that it was in his best interest to dispose of the case rather than to continue with the trial, because if he were convicted,

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[3]Defendant claimed that by a separate agreement, Landau had owed him $10,000 as a finder's fee and for management of the property. Landau then converted this debt to shares in the partnership (B.30-33).

defendant faced a possible jail term (Cutler: A.369-70). While defendant was upset about the prospect of admitting his guilt, he seemed to understand all the options (Cutler: A.370, 393-394). Once defendant decided to plead guilty, his main concern was to pay as little restitution as possible (Cutler: A.78-79).

Decision on the Motion to Withdraw the Plea

In a decision dated July 19, 1982, the court denied defendant's motion to withdraw his plea (B.75).

The court found that Mr. Cutler was an experienced criminal attorney who had effectively represented defendant over the three-year course of the proceedings (B.70, 74). Mr. Cutler had appeared in court on this matter over thirty times. He had made discovery motions, and, at defendant's request, had moved to dismiss the indictment in the interest of justice and on the ground that defendant had been denied his right to a speedy trial (B.70). Moreover, prior to the plea, Mr. Cutler had participated in nearly two weeks of trial which involved over 500 exhibits (B.71).

As the trial progressed, defendant became increasingly apprehensive and nervous (B.71). When Landau pled guilty, Mr. Cutler advised defendant that it was in his best interest to do the same (B.71).

On May 12, 1981, defendant did plead guilty (B.71). At that time the court advised defendant of all his constitutional rights, and defendant acknowledged that he understood them (B.72-73). Defendant admitted his guilt (B.71-72). At no time did defendant claim innocence, nor did he ever indicate that Mr. Cutler had forced him to take the plea (B.71). Indeed, defendant, who is an intelligent businessman, understood all of his options and knew just what he was doing when he pled guilty (B.74).

The court found that defendant had unequivocally asserted that he would pay $200,000 restitution (B.74). There was no change of circumstances which would keep him from meeting that obligation (B.74).

The Sentence

Defendant was sentenced on October 25, 1982, to five years' probation and to make restitution of $200,000, plus $2,400 to be paid to the Office of the District Attorney for expenses incurred during trial before defendant pled guilty (A.414-15). Defendant was ordered to pay an initial $40,000 on the date of sentence, plus $40,000 every three months beginning January 15, 1983 (B.63).[4]

The State Appeal

In his brief to the New York State Supreme Court, Appellate Division, Second Department, defendant raised two issues: That he was denied his right to a speedy trial and that his plea was entered involuntarily. The Appellate Division affirmed the judgment of conviction without opinion. *People v. Kupferstein,* 100 A.D.2d 983, 473 N.Y.S.2d 898 (2d Dep't 1984). Defendant raised the same claims in his application to the New York Court of Appeals for leave to appeal the Appellate Division's order. The Court of Appeals denied his application. *People v. Kupferstein,* 62 N.Y.2d 986, 479 N.Y.S.2d 1040 (1984). Defendant's petition to this Court for a writ of certiorari to the New York Supreme Court, Appellate Division, Second Department, was also denied. *Kupferstein v. New York,* __ U.S. __, 105 S.Ct. 248 (1984). In that application defendant reiterated the same two claims and added the claim that he had been denied effective assistance of counsel.

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[4]Thus far, defendant has paid a total of approximately $160,000 to the Department of Probation. In March of 1985 defendant paid $115,084.21. In addition, he made three separate $10,000 payments in May, July, and September, and a payment of $15,000 in December of 1985.

The Federal Proceedings

Defendant then filed a petition for a writ of *habeas corpus* with the United States District Court for the Southern District of New York. He raised the same three claims he had advanced in his certiorari petition: speedy trial, ineffective assistance of counsel, and involuntary plea. The District Court held that all three claims had been exhausted, and, relying on the presumptively correct state court findings, held that they were without merit. The District Court thus dismissed defendant's petition, but granted a certificate of probable cause to the Court of Appeals for the Second Circuit as to the latter two claims (Knapp, J.). Defendant raised the two certified claims in the Second Circuit, and that Court, also relying on the state hearing court's findings of fact, affirmed the District Court's dismissal of the petition. This petition followed.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Defendant Never Properly Presented His Ineffective Assistance Of Counsel Claim To The State Courts, And Therefore It Is Not Properly Before The Federal Courts On This Petition For Habeas Corpus; Moreover, The Claim Is Without Merit.

Defendant never asserted in any state court that he was denied his Sixth Amendment right to effective assistance of counsel. He claimed only that his plea was involuntary. Although defendant alleged facts in his state court brief which, viewed in their most favorable light, might possibly suggest an ineffective assistance of counsel claim, he never actually presented that claim. *See Anderson v. Harless,* 459 U.S. 4, 6 (1982). Instead he relied on those facts to support his voluntariness claim. He argued that because he was dissatisfied with his attorney's preparedness and ability to defend him, and afraid of

what would happen if he continued with the trial, he thought he had no choice but to plead guilty, although he did not want to do so (Defendant's State Brief at 14, 19). He also claimed that he would not have pled guilty if his attorney had not cajoled and frightened him (Defendant's State Brief at 13, 19-20).

Defendant, however, never claimed that his attorney was so unprepared or so unable to defend him as to be ineffective. Nor did he argue that his attorney's conduct in cajoling and frightening him rose to the level of incompetency. He chose not to raise that claim, focusing instead on the voluntariness issue. Under these circumstances, defendant failed to inform the state court of his ineffective assistance of counsel claim, and has thus failed to exhaust his state remedies with respect to that claim. *Id.; Picard v. Connor,* 404 U.S. 270 (1971). As a result, the claim was not properly before the federal courts on this petition for *habeas corpus,* and the merits of the claim are not properly before this Court.

Moreover, the record shows that the claim is utterly without merit, as the federal courts below found. In defendant's state court collateral attack on his guilty plea pursuant to New York Criminal Procedure Law §440.10, he claimed that the plea was involuntary, in part, due to the actions of counsel. Although defendant never specifically alleged ineffective assistance of counsel, the hearing on the collateral attack necessarily presented the court with all the testimony relevant to such a claim. The court obviously found defendant's testimony incredible as it denied defendant's application to withdraw the plea.

In any event, the record clearly supports the decision of the federal *habeas* court to reject the claim. The record demonstrates that counsel, an experienced trial attorney,

appeared in court over thirty times. Counsel filed all appropriate discovery motions and two motions to dismiss the indictment. Defendant and counsel communicated frequently about the case and complete advice was given on the benefits and detriments of pleading guilty. Nothing in the record indicates that counsel supplied any misinformation to defendant.

The prosecution's initial plea offer included ninety days' incarceration and $1,000,000 restitution. Defendant's sentence on the plea was probation and $200,000 restitution. Considering the potential liability of four years' incarceration and the strong evidence of guilt, it can hardly be said that the advice of counsel to accept the offer was outside the range of reasonable professional advice, or rendered an unjust result. *See Strickland v. Washington,* __ U.S. __, 104 S.Ct. 2052 (1984).

2. Neither Defendant's Claim Of Innocence Nor His Challenge To The Voluntariness Of His Guilty Plea Raises A Substantial Federal Question.

Defendant treats this, his second petition for a writ of certiorari to this Court, as though it were just another appeal to a court with plenary jurisdiction over the issues raised below. Defendant fully litigated below his claim that the plea was involuntary and unknowing, and now he simply seeks to relitigate the claim before this Court. This Court refused to hear this same claim when defendant sought a writ of certiorari to the state court, and nothing has changed since then to warrant this Court's hearing the claim now on a writ of certiorari to the federal court.

As the Second Circuit correctly held, defendant knowingly and willingly pled guilty, and thus was not entitled to withdraw his guilty plea. That conclusion was based on the trial court's presumptively correct factual

findings, *see Sumner v. Mata,* 449 U.S. 539, 546-47 (2d Cir. 1981), made after a full evidentiary hearing which afforded defendant due process. *See Blackledge v. Allison,* 431 U.S. 63 (1977). It is clearly supported by the record which shows that defendant knowingly and voluntarily waived his constitutional rights and pled guilty with full knowledge of the consequences.

The record amply supports the trial court's finding that defendant was an intelligent businessman, who, while competently represented by a knowledgeable and experienced attorney, knowingly waived his constitutional rights and pled guilty with full knowledge of the consequences. He was fully aware of the charges against him and without equivocation recited his own culpable conduct to each element of Falsifying Business Records in the First Degree, one of the 124 counts in the indictment. The trial court found no merit in defendant's claim that he had relied on certain unfulfilled promises regarding the amount and payment schedule of restitution.

The standards employed by the trial court were those enunciated in *People v. Miller,* 42 N.Y.2d 946, 398 N.Y.S.2d 133, 367 N.E. 640 (1977), and guaranteed that the plea represented a "voluntarily and intelligent choice among the alternative courses of action open to defendant" as mandated by federal law. *North Carolina v. Alford,* 400 U.S. 25, 31 (1970); *Santobello v. New York,* 404 U.S. 257 (1971); *Boykin v. Alabama,* 395 U.S. 238 (1969). The trial court recognized that assertions of innocence are significant in determining whether a plea may be withdrawn, but it found defendant's assertions irrelevant and incredible. Essentially defendant's claim of innocence was based upon a belief that he could not be criminally culpable for actions made on behalf of his co-defendant employer. This legal theory was incorrect. Thus, as a factual matter, defendant did not effectively

deny his culpability and there was no reason to permit him to withdraw his plea. *United States v. Barker,* 514 F.2d 208, 220 (D.C. Cir.), *cert. denied,* 421 U.S. 1013 (1975).[5]

Absent a constitutional violation, if the advantages of the plea bargaining system are to be secured, a guilty plea must be accorded a great measure of finality. *Blackledge v. Allison,* 431 U.S. 63, 72 (1977). This petition raises only factual issues, of interest to defendant only, in well settled areas of the law. This Court has long held that it does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220, 227 (1925). The petition points out no constitutional error in the court below. The record demonstrates strong evidence of guilt and raises no legal issue worthy of this Court's review.

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[5]It is well settled that even where contemporaneous with a guilty plea a defendant claims innocence, the plea may nonetheless be accepted if there is strong evidence of guilt. *North Carolina v. Alford,* 400 U.S. 25 (1970); *United States ex rel. Dunn v. Casscles,* 494 F.2d 397 (2d Cir. 1974). In the instant case, the guilty plea came two weeks and 500 exhibits into the trial. In addition, defendant confessed to each element of the crime at the plea hearing. The record as a whole demonstrates the strong evidence of guilt that was before the court when it accepted the plea.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Brooklyn, New York
February 15, 1986

Respectfully submitted,

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